

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 896 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT
and

MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? YES
 2. To be referred to the Reporter or not? NO :
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? NO
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? NO
 5. Whether it is to be circulated to the Civil Judge? NO :

AJAYKUMAR LALANRAY

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner
MR BD DESAI APP for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

Date of decision: 21/01/2000

ORAL JUDGEMENT : PER MR. JUSTICE J.R. VORA.

1. This appeal is preferred by the original accused
against his conviction by the order of learned Sessions
Judge, Court No. 8, City Sessions Court in Sessions Case

No. 96 of 1992 for the offences punishable under Sections 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act). The accused-appellant was sentenced to 10 years Rigorous Imprisonment and fine of Rs. 1 lac. In default, he was ordered to undergo Rigorous Imprisonment for six months.

2. Facts leading the prosecution case of the appellant is as under :-

The incident in question had occurred on 17th January, 1992. On that day, at about 14 hours the complainant was on his duties with Mr. S. J. Rathod, P.S.I., Traffic Near Booth No. 8 alongwith Dy. Superintendent of Police Mr. V. J. Desai and Police Inspector Mr. J. J. Meveda and Police Inspector Mr. N. S. Patel and with other police constables at Kalupur Circle at Ahmedabad and were regulating the traffic. At about 14 hours, these police officers saw one person coming from Kapasia Bazar Road, carrying a heavy hand bag in his hand. On seeing these police officers, the said person was jibbed and hesitated. This caused suspicion in the mind of the police officer that there was something wrong with the person and the person concerned was hiding something illegally in the hand bag. Therefore, the complainant Mr. S. J. Rathod detained the said person and asked him to open the hand bag, which he was carrying on. In the meantime, Mr. Rathod also called for two panchas. In the presence of these two panchas, the said person informed his name to be Ajaykumar Lalatram, resident of village Rampur, District : Muzzafarpur, State of Bihar. He was speaking in Hindi. When the accused Ajaykumar Lalatram was asked to reply as to what was in the hand bag, he could not reply properly. Therefore, he was ordered to take out things from the hand bag in the presence of panchas. At the first instance, from his hand bag, the accused took out a plastic bag, which contained at about 14 rolls of black substances, which were 6 inches long. The panchas and Mr. Rathod smelt the substance and they found that the odour coming out of these rolls was reasonably the odour of Charas. The substance was required to be weighed and therefore, Mr. Rathod called for the Goldsmith Mr. Rajendrakumar Chimanlal Patel nearby shops. In the presence of panchas, thereafter, this bag carried out by the accused was thoroughly searched. In all in plastic beg, various numbers of black rolls were found, each roll was weighed. In all, the weight was 2887 Gms. and the rolls were 94 in numbers. After following the due procedure, P.S.I. Mr. Rathod, in presence of Panchas,

seized the above mentioned rolls and during that time, he also informed Forensic Science Laboratory and experts from Forensic Science Laboratory reached at the spot. They examined the substance found from the accused and on preliminary examination, they declared the substance to be Charas and contraband article under the NDPS Act. The panchnama in the presence of two panchas was drawn, which was signed by both the panchas, Police Inspector Mr. V. J. Desai, Dy. Superintendent of Police and other police inspector Mr. Mevada. The accused was asked to produce the permit or pass for possession of this contraband articles, but the accused could not produce such permit or pass. Thereafter, Mr. Rathod, wrote a complaint and this complaint, panchnama and muddamal were sent to Kalupur Police Station for registration. The P.S.O. Kalupur Police Station registered a crime on the basis of this complaint. P.S.O. at that time was Police Inspector Mr. L.B. Purohit, who registered the complaint and took over the investigation. He sent sealed muddamal to Crime Writer Head Constable Ranchhodrai, who forwarded sealed muddamal to Forensic Science Laboratory for analysis. After investigation and recording of necessary statements, the investigation thereafter, was handedover to one P.S.I. Mr. L. P. Patel. From the investigation, thereafter, it was revealed that the accused - the present appellant obtained these muddamal from one Vinodsingh Amita Zumia and a chargesheet was filed before the Metropolitan Court against the present appellant i.e. Ajaykumar and Vinodsingh Amita Zumia under Sections 20 and 22 of the NDPS Act.

3. Since the offences under NDPS Act are triable by the Court of Sessions, this case was committed to the City Sessions Court, where it was registered as Sessions Case No. 96/92. The City Sessions Judge, framed the charge against both the accused vide Ex. 2 for the offences punishable under Section 20(b)(2) and 22 of the NDPS Act. The learned Additional Sessions Judge has examined seven witnesses tendered by the prosecution. Those seven witnesses are as under :-

1. P.W.1 Panch Pravinchandra Chitranjandas, Ex. 13.
2. P.W.2 Rajendra Chimanlal Soni, Ex. 27, who weighed the substance found from the accused No. 1.
3. P.W.3 P.S.I. Satuji Jivanji Rathod, Ex. 28, who is the complainant.
4. P.W.4 Head Constable Rumaji Shivaji Sotha,

Ex.24, who was present when search was conducted.

5. P.W.5 Head Constable Dhirubhai Ukabhai Ex. 37

6. P.W.6 P.S.I. L.B. Purohit, Ex. 29,
Investigating officer.

7. P.W.7 P.S.I. P.D.Vaghela, Ex. 43,
Investigating Officer.

Learned Additional Sessions Judge, after hearing both the parties, came to the conclusion that the prosecution could successfully establish the case against the accused No. 1 i.e. present appellant and therefore, the City Sessions Judge convicted the present appellant. While since there was no evidence at all against accused no. 2, he was acquitted.

4. Learned advocate Ms. Subhedra G. Patel for the appellant was heard while learned A.P.P. Mr. B. D. Desai, on behalf of respondent was heard at length.

5. Both the learned advocates assisted this Court to greater extent and have taken us thoroughly through the record and through the evidence of each of the witness and the documents produced by the prosecution. We have carefully examined the records of the appeal as well as of the sessions case.

6. Learned Additional Sessions Judge in his judgement vide para-16 and onwards has given his reasons for his decision. Learned Sessions Judge has observed that there are two star witnesses of the prosecution and they are P.W. -1 Pravinchandra Chitranjandas, who is a panch witness of panchanama Ex. 25 and P.S.I. Mr. Rathod, who conducted the search and filed the complaint. Learned Additional Sessions Judge observed that they are creditworthy and he placed reliance on their evidence and appreciating mainly this evidence alongwith other supporting evidence, the learned Additional Sessions Judge came to the conclusion that the case of the prosecution was proved beyond reasonable doubt.

7. Mrs. Patel on behalf of the appellant has contended that learned Additional Sessions Judge has wrongly placed reliance on the testimony of the panch witness Pravinkumar Ex. 13 . The defence of the accused

is probable that from Narol Circle he was arrested from Rikshaw and that he is working in a factory situated at Narol. That bag did not belong to the accused. There is contradiction regarding the time of registration of complaint. Witness Rajendra Soni at Ex. 27 is also known to police and therefore, his evidence should not be believed because he is interested witness. Miss Patel much stressed in her argument regarding breach of mandatory provisions of Sections 42 and 50 of the NDPS Act.

8. While learned APP supported the judgement and contended that prosecution has established its case through independent witnesses and their credit worthiness could not be assailed. Learned APP Mr. Desai further urged that the recovery being a chance recovery officer who conducted the search was not obliged to follow procedure under Sections 42 and 50 of the NDPS Act.

9. Considering the rival contentions, what clearly emerges from evidence is that so far as the facts of the prosecution case are concerned, it is established by the prosecution beyond reasonable doubt. P.W. - 1 Panch of seizure and search panchnama Mr. Pravinchandra Chitranjandas in his deposition at Ex. 13 has in detail said that he was called by the police on 17th January, 1992 at about 14.15 hours near kalupur Circle, while he was going to the Railway station. He deposed that P.S.I. Mr. Rathod, other police inspector, Dy. Superintendent of Police or other persons were present there. The accused was also present there. The other panch witness was also called for and he was also present. He deposed that in the presence of him and the other panchas, the hand bag, which was carried out by the accused was got opened and accused i.e. present appellant took out a plastic bag from his hand bag. Then in their presence, plastic bags were opened. They found 6 inches long black rolls and on smelling the same, it was found that the odour resembled to Charas as was emitting from the said black substance. In their presence, according to this witness, Forensic Science Laboratory experts came on the spot. On preliminary examination of the substance found from the accused, they opined that the substance was charas. This witness also deposes the procedure by which the muddamal Charas was seized by the police. In all respect, this witness has narrated the incident in quite truthful manner. His evidence appears to be cogent and natural. This witness was working as a Recovery Officer, in Navdeep Co-Operative Bank at that relevant time. A detailed cross-examination was conducted on behalf of the accused no. 1 of this witness, but when we scrutinised

his evidence, we could not find anything from the cross-examination by which, the evidence of this witness can be impeached in any manner. It is not brought on the record that this witness was acquainted with the police or he had some enmity with the accused to frame case under the NDPS Act against the accused. Therefore, he is an independent, truthful and a credit worthy witness and his evidence was such that nothing could be alleged regarding his evidence.

10. The other material witness is the complainant, P.S.I. Mr. Rathod. He has stated that along with other officers, he was on traffic duty at that relevant time. As aforesaid, this officer found the accused in suspected condition. The panchas were called by Mr. Rathod. In the presence of panchas, the hand bag carried on by the accused no. 1 present appellant was got opened and Charas was found. This was also certified by Forensic Science Laboratory on preliminary examination. The evidence of Mr. Rathod at Ex. 28, P.W. 3 is in support of the evidence of P.W. -1 Pravinchandra Chitranjandas Ex. 13. In cross-examination of this witness Mr. Rathod, a defence version in shape of suggestion was levelled that at the relevant time, Mr. Rathod was on duty near Narol Circle and the accused -appellant since he was working in Ahmedabad had boarded a rickshaw, sharing with other passengers. Those passengers were carrying the concerned hand bag from which, muddamal was recovered and on seeing P.S.I. Rathod at Narol Circle, the rickshaw was abandoned by the driver and the driver and other persons escaped from the rickshaw and Mr. Rathod found accused and the hand bag in the rickshaw and the accused was thereafter connected with the bag, which did not belong to him and the case was framed against him. All these suggestions were denied by Mr. Rathod in his deposition. Not only that, he produced his diary and looking to this diary, upto 9-00 O'clock his duty was at Narol Circle and thereafter, his duty was fixed at Kalupur Circle.

11. We have re-appreciated the evidence of the above two witnesses alongwith other supporting witnesses. The learned Additional Sessions Judge was right in holding that so far as the evidence of the prosecution case is concerned, nothing could be said regarding the prosecution witness, who deposed the case of the prosecution and the learned Additional Sessions Judge was right in concluding that the prosecution could prove the case against the present appellant beyond reasonable doubt.

12. Now, we shall examine the next contention raised on behalf of the appellant that mandatory provisions of the NDPS Act, i.e. Sections 42 to 50 of the Act were not complied with and, therefore, the accused is entitled to acquittal. We have gone through the various provisions of NDPS Act. Section 42 of the Act is not applicable to the prosecution case because the accused was found in public place. So far as Section 43 of the Act is concerned, the P.S.I. Rathod is an empowered officer under the N.D.P.S. Act, who has conducted search. Sections 44 to 49 of the Act also will have no application to the present case, but we have carefully examined whether there is proper compliance of mandatory provision of Section 50 of the Act or not. In recent decision of STATE OF PUNJAB VS BALDEVSINGH, reported in (1999 (6) SCC 172) it is held that it is imperative for the Investigating Officer to inform the suspect, orally or in writing about his right to be searched before a Gazetted Officer or a Magistrate. Failure to give such information, would not vitiate the trial but render the recovery of illicit article as illegal and vitiate the conviction and sentence if recorded only on the basis of possession of such illicit article. In the present case, the conviction undoubtedly was on the basis of possession of illicit article. Now, whether prosecution has proved that there was a due compliance of Section 50 of the NDPS Act, or not would be crucial question to be determined. So far as the facts of the prosecution case are concerned, the prosecution has proved beyond doubt that the Police Officers were on traffic duty at Kalupur Circle, when they noticed accused -appellant coming from kapasia Bazar. Since he hesitated suspiciously on seeing the police, the police officer suspected that either there was something wrong with the person or the person concerned carries some contraband articles in the hand bag, which he carried. But it is crystal clear that none of the Police Officers, present had any prior information that any narcotic drugs is to be transported by any person at the relevant juncture. Only from the above mentioned situation, the Police Officer by chance bumped into the recovery of contraband narcotic drugs i.e. Charas. Therefore, the question would arise, whether in these circumstances, the Police Officer who has conducted search would be required to follow mandatory provisions of Section 50 of the NDPS Act. In the above mentioned case of Baldevsingh (supra), the Supreme Court in para 14 observed as under :-

14. The provisions of Section 100 and 165 CrPC are not inconsistent with the provisions of the NDPS Act and are applicable for affecting search,

seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure, comes across a person being in possession of the narcotic drug or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from the state in accordance with the provisions of CrPC Act. In Balbir Singh Case after referring to a number of judgements, the Bench opined that failure to comply with the provisions of CrPC in respect of search and seizure and particularly those of Sections 100, 102 and 103 and 165 per se does not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view"

In the case of State of Punjab Vs. Balbirsingh, reported in AIR, 1994, 1872, the Apex Court ruled in para -26 as under :-

"26. The questions considered above arise frequently before the trial Courts. Therefore, we find it necessary to set out our conclusions which are as follows :

- (1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also,

then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

Rest of the para - 26 is not material for the present case. Now therefore, from the above principles laid down by the Apex Court in the above decisions, it is clear that when the Police Officer, accidentally or causally, without prior intimation, happens to conduct a search and in pursuance to that search, any contraband article is found, such Police Officer is not obliged to follow the procedure or mandatory provisions as envisaged by Section 50 of the NDPS Act. This is so because in such circumstances, the Police Officer who conducts such a chance search, would not know what would be the result of the search. However, after the search, if he finds that the substance recovered was contraband substance under NDPS Act, then from that stage he would be obliged to follow the provisions of N.D.P.S. Act. So far as the facts of the present case are concerned, the hand bag of the accused-appellant was searched in presence of the panchas, when the substance was revealed to the panchas, he felt suspicious that the substance might be Charas. This search was conducted and completed and at about completion of search, the Forensic Science Laboratory experts called by Mr. Rathod, P.S.I. were reached at the spot, who on preliminary examination of the substance, opined the substance to be the Charas and contraband article. Therefore, at this juncture of the process, the Police Officers in the present case were obliged to follow the provisions of the NDPS Act, but before that as seen from the evidence that the search was almost completed and thereafter police officers came to know that what was found was charas. Therefore, the compliance of mandatory provisions of Section 50 of the N.D.P.S. Act was not required at all. So, we have examined all the contentions raised by the accused-appellant and we come to the conclusion that the learned Additional Sessions Judge was right in concluding that the prosecution proved its case beyond reasonable doubt and the accused No. 1 original appellant herein was required to be convicted under Sections 20(B) and 22 of the NDPS Act.

In this view of the matter, this Appeal fails being without any substance and the same is dismissed accordingly.

PALLAV